Supreme Court, U.S.
FILED
AUG 7
CLERK

No. 97-71

In The

Supreme Court of the United States

October Term, 1996

DEKALB STONE, INC.,

Petitioner,

v.

DEKALB COUNTY, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Supreme Court should issue a writ of certiorari when petitioner is appealing the denial of its motion for preliminary injunction without showing abuse of discretion by the trial court and when the evidence presented to the trial judge on the motion did not show a substantial likelihood that petitioner would succeed on the merits of its claim that the property was previously mined as a rock crushing quarry.

Whether certiorari should be granted when the Eleventh Circuit's decision was consistent with existing precedent of this Court and when petitioner's asserted state law property interest has not been recognized by this Court as a "fundamental" right or liberty protectible under the substantive due process clause.

LIST OF PARTIES

The list of parties provided by petitioner appears to be complete.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING CERTIORARI 10

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) 18, 28

Albright v. Oliver, 510 U.S. 266 (1994) 17, 18, 20, 26, 30

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) 29

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) 15

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 14, 21, 22, 30

Board of Regents v. Roth, 408 U.S. 564 (1972) 15, 18, 22, 30

Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) 14, 16

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) 24

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) 23

Carson v. American Brands, Inc., 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) 11

Clark v. County of Winnebago, 817 F.2d 402 (7th Cir. 1987) 27

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985) 14, 21

Collins v. City of Harker Heights, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ..12, 13, 16, 17, 22

Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustments of City of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985) 7

TABLE OF AUTHORITIES – Continued

Page

Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) 13, 21

DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell, 53 F.3d 592 (3d Cir. 1994) 24, 25

DeKalb Stone, Inc. v. County of DeKalb, 106 F.3d 956 (11th Cir. 1997) 2, 10, 12, 22, 23

Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989) 17

Dolan v. City of Tigard, 512 U.S. 374 (1994) ... 18, 28, 29

Gardner v. City of Baltimore, 969 F.2d 63 (4th Cir. 1992) 25

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) 18, 20, 26, 28, 29, 30

Greenholtz v. Inmates of Nebraska Penal Complex, 442 U.S. 1 (1979) 14, 18

Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) 26

Harrah Ind. School Dist. v. Martin, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) 14, 22

Honore v. Douglas, 833 F.2d 565 (5th Cir. 1987) 25

Kauth v. Hartford Insurance Company of Illinois, 852 F.2d 951 (7th Cir. 1988) 27

Landmark Land Company of Oklahoma, Inc. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) 29

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) 28

Macri v. King County, 110 F.3d 1496 (9th Cir. 1997) 29

TABLE OF AUTHORITIES – Continued

Page

Maguire v. Reardon, 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed.2d 625 (1920) 7

McKinney v. Pate, 985 F.2d 1502, *vacated at* 994 F.2d 772 (1993) 16

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898 (1995) 12, 13

Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) 15

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 18

Ortiz De Arroyo v. Barcelo, 765 F.2d 275 (1st Cir. 1985) 23

Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed.2d 288 (1937) 15

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) 12

PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1990) 24

Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 12, 14, 16

Polenz v. Parrott, 883 F.2d 551 (7th Cir. 1989) 27, 28

Regents of University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) 21, 22

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) 15

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 14

TABLE OF AUTHORITIES – Continued

Page

RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911 (2d Cir. 1989)..... 24

Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987)..... 26

Shenk v. Zoning Commission of the District of Columbia, 440 F.2d 295 (D.C. Cir. 1971) 30

Synanon Foundation, Inc. v. California, 444 U.S. 1307, 100 S.Ct. 496, 62 L.Ed.2d 454 (1979)..... 11

University of Texas v. Camenisch, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)..... 11

U.S. v. Salerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)..... 15

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)..... 15

Williams v. Texas Tech University Health Sciences Center, 6 F.3d 290 (5th Cir. 1993)..... 26

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)..... 20

Zahra v. Town of Southold, 48 F.3d 674 (2d Cir. 1994) 24

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).....13, 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. XIV, §1 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND ORDINANCES:

O.C.G.A. §12-4-72(15) 7

O.C.G.A. §12-4-75; §12-4-83; and §12-4-84..... 7

28 U.S.C. §1254(1) 1

28 U.S.C. §1292(a)(1)..... 11

42 U.S.C. §1983.....9, 25

TREATISES:

91 Harvard Law Review 1502 14

OPINIONS BELOW

The reported opinion of the United States Court of Appeals for the Eleventh Circuit is located at 106 F.3d 956 (11th Cir. 1997) and is accurately set forth as Appendix A, beginning on page 1a of DeKalb Stone's petition for certiorari. The decision and order of the United States District Court for the Northern District of Georgia, Atlanta Division, has not been reported, and is accurately reprinted and attached as Appendix B, beginning at page 10a of DeKalb Stone's petition for certiorari.

JURISDICTION

DeKalb Stone, Inc. has petitioned for writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves interpretation of the Fourteenth Amendment to the United States Constitution which reads in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .
>
> U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

A. Summary:

The current petition presents no compelling case for granting certiorari. It is a local land use case where Plaintiff has alleged no taking of property or deprivation of any interest protected under substantive due process. Instead, this Plaintiff disguised a takings claim as one for substantive due process because the actions complained of do not amount to a taking. Specifically, Plaintiff may use the land lawfully in a variety of manners, either in accordance with a nonconforming use granted to Plaintiff's lessor in 1989 to continue a hand picked dimension stone quarry, or it may use the land in

accordance with the uses allowed under the property's current zoning. When Plaintiff sought to expand the dimension stone quarry and turn it into a commercial gravel plant where substantial blasting and crushing would occur, the County halted this illegal expansion. Plaintiff then brought this case claiming a substantive due process violation in an effort to circumnavigate DeKalb County's ordinance which prohibits the unauthorized expansion of nonconforming uses. However, even under a substantive due process analysis, the claim fails because Plaintiff has not asserted a deprivation of a fundamental right.

Through this petition, Plaintiff seeks a further review of the denial of a motion for preliminary injunction, and granting certiorari will likely result in piecemeal litigation and further appeals. Evidence presented to the District Court on the motion for preliminary injunction indicated that the property had only been used prior to 1989 as a hand worked, dimension stone quarry, and that Plaintiff was trying to illegally expand this nonconforming use by turning it into a surface mine and commercial gravel crushing operation in violation of the County's ordinances. On the evidence presented, the District Court denied the injunction, finding Plaintiff was (1) not likely to prevail on the merits of its claim that such a commercial gravel operation previously existed on the property, and (2) not likely to prevail on a claim that the County arbitrarily or capriciously stopped this illegal expansion of the nonconforming use.

The Eleventh Circuit affirmed the denial of the preliminary injunction because there was no abuse of discretion by the trial Court. *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 960 (11th Cir. 1997). The Eleventh Circuit also opined that Plaintiff failed to state a claim for substantive due process relief because, at most, it alleged only an executive violation of a state created property right instead of alleging any deprivation of a fundamental right protected under the constitution. *Id.* at 959-960. That reasoning is consistent with

precedent of this Court and therefore presents no compelling case to accept certiorari either.

B. Statement of Facts:

Zoning Regulations Applicable To The Subject Property:

At all relevant times for this case, the real property has been owned by the Housworth family. The land itself is located in DeKalb County, a political subdivision of the State of Georgia. From 1991 to the present, DeKalb Stone, Inc. (Petitioner herein) has subleased the property from the Housworth's wholly owned corporation, Bradley Mountain, Inc.

In 1956 when DeKalb County enacted its first Zoning Ordinance, the subject property was located in an area zoned as RA-150 (Residential-Agricultural).[1] Subsequently, in 1963, the Subject Property was rezoned by the DeKalb County Board of Commissioners to R-100 and R-85 (Single Family Residential) and has been so zoned ever since.

The removal or extraction of rock or gravel by any process, including hand picking of dimension stone, is not a permitted use in the Single Family Residential zoning districts. This Zoning Ordinance and all subsequent revisions provided that nonconforming uses in existence at the time of the adoption of the Zoning Ordinance may be continued. However, a nonconforming use will be lost if discontinued for a period of six (6) straight months and it cannot be re-established at that point. The Zoning Ordinance further provided that a nonconforming use cannot be extended, nor can its value be enhanced, unless the extensions or enhancements conform with the zoning classifications for the district in

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[1] The 1956 Zoning Ordinance provided that quarrying uses could be continued in the RA-150 zoning district if a conditional use permit was obtained, and that use permits were required for any extension of quarrying operations. Yet, no application for a conditional use permit or permit to extend quarrying operations for the Subject Property was ever filed.

which it is located. Zoning Ordinance §§27-46, 27-47. In other words, a nonconforming use is exempt from the zoning ordinance until it is extended or its value enhanced, at which time it must then conform with the existing zoning for the area where the property is located.

Another option for a property owner wishing to legally expand a nonconforming use is to apply for a rezoning of the property. The DeKalb County Zoning Ordinance permits a property owner to apply to have property rezoned from one zoning district to another. Under this ordinance, only the Board of Commissioners, the legislative branch of DeKalb County government, is permitted to rezone property. However, neither Housworth nor Plaintiff DeKalb Stone have ever applied to the Board of Commissioners to rezone the property to the M-2 (Heavy Industrial) classification where blasting and crushing operations would be permitted.

Housworth's Hearing Before the Zoning Board of Appeals:

In 1989, twenty-six (26) years after the Subject Property was zoned for Single Family Residential, Alton Housworth filed his first application for a business license to operate a rock quarry on the Subject Property. On September 18, 1989, the Development Director denied the request because there was insufficient evidence to establish the *continuous* operation of a dimension stone quarry on the Subject Property. Housworth then appealed the Development Director's decision to the DeKalb County Board of Zoning Appeals. The Board of Zoning Appeals is an administrative body created by the DeKalb County Board of Commissioners through the Zoning Ordinance, with limited, defined duties. The Board of Appeals has no authority to vary the uses permitted on an appellant's property nor can it rezone the property since only the Board of Commissioners has this power. Instead, the

Board of Appeals' authority is exclusively limited to correcting errors alleged to have been made by County administrative officials while enforcing the county code. Zoning Ordinance §27-68(4).

At the Zoning Board of Appeals, Housworth sought to overturn the decision of the Development Director, i.e. that insufficient evidence had been presented to establish a *continuous* non-conforming use as a quarry. On November 8, 1989, the Board of Appeals held a hearing on Housworth's appeal. The evidence submitted by Housworth to the Board of Appeals established that the Subject Property had perhaps been continuously used as a hand picked dimension stone quarry. On that basis, the Board of Appeals overturned the administrative decision and granted Plaintiff a nonconforming use. However, there was absolutely no evidence submitted to the Board of Appeals that blasting and rock crushing operations existed on the Property in 1956 – when the first Zoning Ordinance came into effect – or at any time thereafter. Hence, the Board of Appeals could not have granted a nonconforming use for activity which had never occurred at the property.

Appellant's Attempt to Convert the Dimension Stone Quarry to a Surface Mine and Rock Crushing Quarry:

This grant of a nonconforming use was subject to the provisions of the Zoning Ordinance prohibiting the extension or enhancement of nonconforming uses. Yet, following the 1989 Board of Appeals' decision, Housworth and the Plaintiff attempted to illegally expand the grandfathered dimension stone quarry and develop it into a surface mine and rock crushing quarry.

In March of 1990, Housworth attempted to conduct blasting activity on the property without first seeking County approval for this activity. Upon receiving complaints of blasting at the property, DeKalb County promptly warned Housworth to halt the blasting. DeKalb County further informed Housworth that the Zoning Ordinance required him

to apply for a development permit prior to any further development of the subject property.

Later in March of 1990, the Development Director informed Housworth that the use of the Subject Property must be limited to those operations existing on the Subject Property at or before the grant of the nonconforming use, which was a dimension stone quarry producing rubble, granite curbing, and decorative stone. The Development Director specifically advised Housworth that the Board of Appeals' decision did not approve any blasting and rock crushing activity because no such evidence had been presented that this activity had previously been conducted on the property. The Development Director invited the Housworths to provide such proof and the matter would be reconsidered. Mr. Housworth chose not to provide the requested information, nor did he seek to appeal the Development Director's decision – to prohibit blasting and crushing – to the Board of Appeals. Likewise, Housworth did not apply to DeKalb County for a permit to develop a rock crushing quarry on the property.

Subsequently, the Housworths leased the property to DeKalb Stone. Specifically, on March 15, 1991, the Housworth family incorporated under the name of Bradley Mountain, Inc., and this entity then leased the property. Just two months later, on May 29, 1991, Bradley Mountain, Inc. subleased the property and sold the existing quarry operation to the current lessee, DeKalb Stone, Inc. To purchase the existing quarry operation, DeKalb Stone paid a total of $100.00 and this included the equipment used in the business. The equipment consisted of drills, hammers, wedges, hand tools, and an air compressor which is tyypical of a dimension stone quarry and not a rock crushing quarry.

After buying the existing dimension stone business and leasing the land, Plaintiff DeKalb Stone set about its goal of opening a rock crushing plant even though DeKalb County had previously given clear warnings that this activity was an illegal expansion of the nonconforming use. Documents submitted by DeKalb Stone in 1992 to the Georgia Department of

Natural Resources confirm Plaintiff's intent to open a full scale surface mine and rock crushing quarry where none had previously existed. DeKalb Stone's Application for a Surface Mining Permit to the Georgia Department of Natural Resources includes a projected mining plan, which in turn identifies the large scale capital equipment needed in order to build this surface mine and rock crushing quarry, such as front end loaders, bulldozers, "off road" trucks, explosives and conventional trucks.

The State of Georgia has regulated surface mining activities, including blasting and crushing of rock, since 1968.[2] Although DeKalb Stone may now contend that such activities were conducted prior to 1989, its own documentary evidence refutes this contention. Specifically, DeKalb Stone first submitted an application for a Surface Mining Permit on June 23, 1992. Prior to then, neither Plaintiff nor its predecessors had ever held a surface mining permit for this property. State law requires that an owner obtain a surface mining permit prior to commencing operations and it prescribes civil and criminal penalties for the failure to comply with the Surface Mining Act. O.C.G.A. §12-4-75; §12-4-83; and §12-4-84. However, the State of Georgia specifically exempts "dimension stone quarries" from its definition of "surface mining." O.C.G.A. §12-4-72(15). This leads to the inescapable conclusion that Plaintiff's predecessors were either running a dimension stone quarry and did not need a state surface mining permit, or, Plaintiff's predecessors were running an illegal surface mine and rock crushing quarry. In the latter event, Plaintiff has no right to continue an illegal surface mine because under the law of the State of Georgia, an illegal use of property does not vest any rights.[3]

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[2] "Surface mining" is defined as "any activity constituting all or part of a process for the removal of minerals, ores, and other solid matter for sale or processing or for consumption in the regular operation of a business." Tunnels, shafts, and dimension stone quarries shall not be considered to be surface mining." O.C.G.A. §12-4-72(15).

[3] *Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustments of City of Atlanta*, 254 Ga. 221, 327 S.E.2d 178, 183 (1985), citing *Maguire v.*

DeKalb County's Response to Renewed Blasting:

From 1990 through late 1994, there was no further illegal blasting reported to the County. During this four year span, Plaintiff went about the task of getting the necessary permits from the State of Georgia to run a surface mine and rock crushing quarry. Yet, at the same time, neither Housworth nor Plaintiff applied to DeKalb County to develop the Subject Property as a commercial gravel plant in spite of the fact that Petitioner had received a surface mining permit from the State Department of Natural Resources in 1992.

Sometime in the Fall of 1994, DeKalb Stone resumed the illegal blasting and tried to set up a rock crushing plant without DeKalb County's permission. When this was discovered, DeKalb County quickly stopped this second round of illegal blasting and it halted Plaintiff's efforts to open a gravel plant where none had ever existed. In late December 1994 and in January 1995, Plaintiff was issued three citations for violating the county's ordinances. On December 28, 1994, after receiving the citations, Housworth submitted a development permit for the new business operation on his property. The application included the original 183 acre Subject Property, plus an additional 70 acres.

On February 6, 1995, the DeKalb County Recorder's Court fined Housworth $1,000.00 for illegally expanding a nonconforming use. The Recorders Court also found that Housworth was not entitled to locate or operate heavy equipment on the property, but did not sustain this charge because of a defect in the wording of the citation. On February 8, 1995, DeKalb County advised Housworth to remove any non-permitted equipment or structures from the Subject Property, including the rock crushing equipment. DeKalb County further informed Housworth, consistent with the County Code,

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Reardon, 255 U.S. 271, 41 S.Ct. 255, 65 L.Ed.2d 625 (1920) (enforcement of local ordinance resulting in the demolition of a building constructed in violation of fire code was a matter of local law and not a constitutional violation).

that any expansion of the dimension stone quarry would require the property to be rezoned to the M-2 zoning district. On February 10, 1995, DeKalb County denied Housworth's application for a development permit because it was an expansion of a nonconforming use that was inconsistent with the present zoning classification for the property.

Neither Housworth nor DeKalb Stone sought to appeal the denial of the development permit to either the Board of Appeals, or from the Board of Appeals to the DeKalb County Board of Commissioners. Instead, Housworth challenged the findings of the Recorders' Court by applying for a Writ of Certiorari to the DeKalb County Superior Court. The Writ was sanctioned and the matter had been pending in the DeKalb Superior Court for six (6) months when Housworth voluntarily dismissed the Superior Court action on August 15, 1995. Two days later, Plaintiff DeKalb Stone brought this action in the U.S. District Court.

District Court Denial of Preliminary Injunction:

Plaintiff DeKalb Stone filed the instant action in U.S. District Court asserting a §1983 claim for substantive due process under the Fourteenth Amendment. The complaint also asserted a claim for injunctive relief which asked the Court to prohibit DeKalb County from enforcing its code against Plaintiff's expansion of the nonconforming use.

One month after filing this action, Plaintiff filed a motion for a preliminary injunction seeking to enjoin Defendants from " . . . restricting [or] interfering with . . . " Plaintiff's blasting and crushing operations. The trial Court denied Plaintiff's motion for a preliminary injunction on the grounds, among others, that Plaintiff-Appellant failed to prove a substantial likelihood of success on the merits. In ruling against the Plaintiff's 1995 request for preliminary injunction, the District Court was persuaded, inter alia, by evidence that there are indeed different kinds of quarries and that Plaintiff failed to demonstrate a substantial likelihood of success in showing that the property in question was used for blasting

and crushing rock prior to 1989 (the grant of the legal nonconforming use). *See,* District Court decision, pp. 20 and 22. In denying the request for preliminary injunction, the District Court was also influenced by the fact that the Plaintiff had failed to show substantial likelihood of success on the merits of its claim that the County's decisions were arbitrary or capricious. *See,* District Court decision, pp. 21-22.

Appeal to the Eleventh Circuit Court of Appeals:

Plaintiff appealed the denial of its motion for preliminary injunction. On February 27, 1997, the Eleventh Circuit issued a per curiam decision affirming the District Court's denial of the preliminary injunction, finding no abuse of discretion by the District Court. *DeKalb Stone*, at 960. In addition, the Eleventh Circuit went on to opine that Plaintiff had no substantive due process rights because it had alleged only an executive violation of a state created property right instead of deprivation of a fundamental right. On March 19, 1997, Plaintiff filed a "Petition for Rehearing and Suggestion of Rehearing En Banc". The petition was denied on May 13, 1997.

REASONS FOR DENYING CERTIORARI

1. Declining Certiorari Will Prevent Piecemeal Litigation.

The present matter does not involve fundamental rights protected under substantive due process, but instead, is a local land use case and involves a factual dispute as to what kind of continuous, nonconforming use existed on the property prior to November 8, 1989. On that date, DeKalb County sanctioned a nonconforming use for a quarry which, by all appearances, had only previously been used as a dimension stone quarry. Plaintiff wanted to turn this into a commercial gravel plant in violation of existing zoning ordinances which said a nonconforming use cannot be expanded or enhanced without satisfying existing zoning for the property. To this end, Petitioner applied for a preliminary injunction against DeKalb

County to prevent the County from enforcing its zoning code. The trial Court denied the request for preliminary injunction and this denial was affirmed on appeal by the Eleventh Circuit because it found no abuse of discretion.

That decision should not be disturbed because it is supported by the evidence presented below, and cannot be said to be error. *Synanon Foundation, Inc. v. California*, 444 U.S. 1307, 100 S.Ct. 496, 62 L.Ed.2d 454 (1979) (trial judge's determination of preliminary injunction should be reversed by Supreme Court only when the judge's discretion was improvidently exercised). This petition for certiorari seeks further review of the denial of a motion for preliminary injunction. Therefore, review of this petition for certiorari is not warranted because it could result in multiple appeals and piecemeal litigation since petitioner may still proceed to trial on the merits and prove other facts to potentially change the result of its failed request for injunctive relief.

The Supreme Court has recognized a strong policy against piecemeal litigation, and consistent with that policy, interlocutory review of the grant or denial of a preliminary injunction is disfavored. *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981) (review as of right under 28 U.S.C. §1292(a)(1) will be narrowly construed and is available only when litigants challenge an order of serious, perhaps, irreparable consequence). The Supreme Court has observed that review of the grant of a preliminary injunction is, under most circumstances, not a ruling on the merits, *University of Texas v. Camenisch*, 451 U.S. 390, 394-395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981). Perhaps an irreparable injury could be claimed by Petitioner if the trial court exercised its right to consolidate the hearing on the preliminary injunction with a trial on the merits. *Id.*, at 395. However, since that did not happen here, petitioner is not barred from presenting further evidence at the trial of the case, if such evidence exists, to back up its claim for substantive due process violation and permanent injunctive relief because the trial Court's factual findings at the preliminary

injunction stage are not binding at the trial on the merits. *Id.* This petitioner also has no real claim of irreparable harm that would entitle it to further review of the denial of the preliminary injunction because it may continue to operate the dimension stone business it bought since Respondent agrees that operation of the dimension stone quarry is lawful under the nonconforming use. Petitioner may also develop the property in accordance with the existing zoning ordinances for property in the same zoning classification, or it may apply to have the property rezoned.

2. The Eleventh Circuit's Decision is Consistent with This Court's Precedent on Substantive Due Process.

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 898 (1995) and *DeKalb Stone v. County of DeKalb*, 106 F.3d 956 (11th Cir. 1997) are consistent with precedent of this Court and Petitioner has shown no constitutional deprivation of a fundamental right which would justify acceptance of certiorari by this Court.

The Due Process Clause of the Fourteenth Amendment affords protection against deprivation of life, liberty, or property by a state government. This Amendment provides two types of protection: Procedural and Substantive. *Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992). The test for due process is 1) whether the conduct complained of was committed by a person acting under color of state law; 2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 532, 101 S.Ct. 1908, 1911, 68 L.Ed.2d 420 (1981); *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992) (Under due process, the two issues are whether plaintiff's harm was caused by a constitutional violation, and if so, whether the city is responsible for that violation).

Procedural due process refers to the notion that a person is entitled to notice and an opportunity to be heard, and that the matter be decided by a fair and impartial decision maker. However, the claimant must first pursue any state law remedies before asserting a procedural due process claim in Federal Court.

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The constitutional violation actionable under §1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided, and whether it was constitutionally adequate.
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> *Zinermon v. Burch*, 494 U.S. 113, 125-126, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990).

Substantive due process, on the other hand, refers to government action that violates fundamental rights and is arbitrary or capricious, i.e., not rationally related to a compelling governmental interest. A substantive due process claim is complete when it occurs, regardless of the procedures provided by the state. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). *Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992) (substantive due process rights are protected against certain governmental actions regardless of the fairness of the procedures used to implement them).

The analysis applied to a due process claim typically depends on whether the challenged state action is administrative or legislative. Legislative actions are those which usually apply to a larger segment, if not all, of society such as laws, statutes, and regulations. *McKinney v. Pate*, 20 F.3d 1550, 1557 n. 9 (11th Cir. 1994). In contrast, administrative decisions are ministerial or administrative actions of members of

the executive branch of government and these decisions ordinarily apply only to a more limited group, and often only one person. *Id. See e.g., Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1 (1979) (executive decision to deny parole). In the context of zoning decisions, "[a]dministrative acts are those that single out specificiable individuals and affect them differently from others," such as the grant or denial of a variance request. 91 Harvard Law Review 1502, 1511 (1978).

When a Fourteenth Amendment claim arises from an administrative act, this typically implicates only procedural due process rights. 91 Harvard Law Review at 1509 (1978). *See e.g., Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (Supreme Court applied procedural due process analysis to policeman's claim that he was wrongly terminated from employment in violation of his due process rights); accord, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) (procedural due process applied to petitioner's claim of a protected property interest in continuing employment). Once it is determined to be a procedural due process claim, a plaintiff may not pursue this claim in federal courts without showing that the state fails to provide an adequate procedural remedy to address this deprivation. *Zinermon*, 494 U.S. at 123, 110 S.Ct. at 983.

Conversely, when the Fourteenth Amendment claim arises from a legislative act, the Supreme Court tends to review it under a substantive due process analysis. For instance, only when analyzing legislative acts has the U.S. Supreme Court required a showing that a State is violating private rights only as necessary to promote legitimate state interests. *See, Bowers v. Hardwick*, 478 U.S. 186, 191, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Planned Parenthood*, 505 U.S. at 847; *Harrah Ind. School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (Supreme Court examined state rule requiring continuing teacher education for rational relation to state interest).

In the instant case, the Eleventh Circuit was correct in its finding that substantive due process rights are not implicated in the administrative acts of which DeKalb Stone complains. Accordingly, the petition for certiorari should be denied.

A. Substantive Due Process Protects Only Fundamental Rights.

The Court must also determine the nature of the right being asserted. *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972). Not all rights are protectible under the Due Process Clause. Only fundamental rights are entitled to protection. "Fundamental rights" has been defined in various ways by the Supreme Court, but this term is generally understood to mean those rights and liberties which are so firmly rooted in our common history as to be considered fundamental. *Palko v. Connecticut*,[4] 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed.2d 288 (1937) (J. Cardozo) (certain rights are "implicit in the concept of ordered liberty", and therefore are protected from state infringement by the Fourteenth Amendment); Accord, *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952) (J. Frankfurter); *Whitney v. California*, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (J. Brandeis, concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states"); *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (substantive due process protection is reserved for those liberties deeply rooted in this Nation's history and tradition); *U.S. v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (Fifth Amendment substantive due process protects those rights implicit in the concept of ordered Liberty).

Over the years, the Supreme Court has determined that most, but not all, of the rights contained in the Bill of Rights

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[4] Overruled on other grounds in *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

are incorporated into the Fourteenth Amendment, thereby according them the status of "fundamental".[5] The Court has even determined that certain unenumerated rights nonetheless fall within the protective ambit of the Fourteenth Amendment. *See e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. at 847-848, 112 S.Ct. at 2805 ("Liberties" protected include very personal and private decisions of an individual on such topics as marriage; procreation; family relationships; child rearing and education; and contraception even though these liberties are not spelled out in the Constitution or Amendments).

However, the Supreme Court has been careful over the years to point out that the Due Process Clause does not protect all conceivable rights. Indeed, several prior decisions caution great restraint in expanding the list of fundamental rights which are worthy of Fourteenth Amendment protection.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental.
>
> *Bowers v. Hardwick*, 478 U.S. at 194-195.

In *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Supreme Court refused to find that substantive due process guarantees city employees a workplace with minimal levels of safety. In doing so, the Court expressed reluctance to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended

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[5] In footnote 5 of *McKinney v. Pate*, 985 F.2d 1502, *vacated at* 994 F.2d 772 (1993), Chief Circuit Judge Tjoflat provided a compendium of Supreme Court cases showing that most of the Bill of Rights have been incorporated into the substantive due process clause as "fundamental" rights.

and the doctrine of judicial self-restraint requires exercise of the utmost care whenever considering new claims. *Id.*, 503 U.S. at 125, 112 S.Ct. at 1068. In *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003 (1989), the Court ruled that a State's failure to protect a minor child from further parental beatings does not violate any fundamental right or liberty because due process imposes no duty on the state to protect citizens against violence from private sources. This is because the due process clause is written in a way to protect the public by limiting the state's power to act.

Applying these principles to the present case, the issue becomes does a sub-lessee who has a contract right to the use of certain real property for a term of years have a fundamental right to expand a nonconforming use in violation of existing zoning provisions. Respondent can find no authority for such a fundamental right, and indeed, to expand substantive due process to include executive action in applying local zoning law will effectively nullify land use control by local governments. Worse still, federal courts will become the ultimate arbiters of local land use disputes.

B. There Can Be No Claim for Substantive Due Process When a Specific Constitutional Provision Applies.

Consistent with the announced policy of proceeding cautiously when asked to recognize additional "fundamental" rights, this Court has ruled that if the claimed right arises from a specific constitutional provision, then there is no substantive due process claim under the Fourteenth Amendment. *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, the petitioner had been arrested on a charge of selling a substance which looked like an illegal drug. The charge was later dismissed. Petitioner brought suit for substantive due process violation of his right to be free from criminal prosecution except on probable cause. The majority decision found that Albright's claim should have been argued under the Fourth Amendment because substantive due process, with its "scarce

and open ended" guide posts for responsible decision making did not afford relief to Albright. Where a particular Amendment provides an explicit textual source of constitutional protection against a certain type of government behavior, that Amendment and not the more generalized claim of substantive due process, must be used to analyze such a claim. *Id.*, citing *Graham v. Conner*, 490 U.S. 386, 395 (1989). In *Graham*, petitioner brought a substantive due process claim for injuries suffered when detained under an investigatory stop. There, the Court refused to apply a substantive due process analysis to the petitioner's claim, and instead, noted that the Court must identify the specific constitutional right supposedly infringed and use that constitutional standard to judge the claim of excessive force.

Consistent with *Graham v. Connor* and *Albright v. Oliver*, Plaintiff DeKalb Stone has no substantive due process rights because its claim is governed by the Fifth Amendment's Takings Clause. In reality, Plaintiff has brought a takings claim while using the nomenclature of substantive due process. Plaintiff has alleged interference with its anticipated use of real property from the enforcement of a government ordinance which allows nonconforming uses to be continued, but not expanded or enhanced. The Supreme Court has determined that land use restrictions which do not substantially advance legitimate state interests or which deny an owner any economically viable use of his land will effect a taking. *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Under the facts of the case, it is easy to understand why Plaintiff has tried to disguise its takings claim as one for substantive due process. Plaintiff does not question the constitutionality of the zoning ordinances. Instead, it merely challenges how the zoning enforcement officer applied the ordinances. Specifically, DeKalb Stone claims that enforcement of the ordinance prevents it from using its property as it desires, i.e. building and operating a rock crushing quarry where none ever existed. Yet, this state action does not

deprive Plaintiff of property nor does it prevent Plaintiff from pursuing the multitude of economic uses for the property under the current zoning. Hence, DeKalb Stone has creatively sought to characterize its claim as something less than a taking, i.e. a substantive due process violation of its right to use the property as it chooses. Such a claim, however, does not amount to deprivation of any right protected under substantive due process because there is no fundamental right "to use property as one chooses" in contravention of local zoning ordinances.

As noted by the Court in *Greenholtz v. Inmates of Nebraska Penal Complex*, 442 U.S. 1, 10 (1979), there is a huge " . . . difference between losing what one has and not getting what one wants." (Citations omitted). Likewise, the Court in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) observed that in order to have a protectible due process right,

> . . . a person clearly must have more than an abstract need or desire for [the claimed interest]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Id.* 408 U.S. at 577.

Further, under the reasoning of *Graham* and *Albright*, the Court must look at the nature of the underlying claim and apply the applicable constitutional provision, where it exists, instead of applying the more general substantive due process analysis.

The decisions in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 120 L.Ed.2d 304 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) do not compel a contrary result. Each of these cases involved a physical taking when the State governing body required the owners to surrender a portion of their property for public use as a condition of granting their respective building permits. In each case, the Supreme Court found an uncompensated taking when the requirement to dedicate land was not reasonably related to the development at hand.

Here, in contrast, there has been no taking of property from DeKalb Stone and there has been no requirement imposed on DeKalb Stone that it dedicate any portion of its leasehold property for a public use. Instead, DeKalb County has merely enforced its existing land use ordinances to prohibit an illegal expansion of a nonconforming use and thereby prevent DeKalb Stone from building a surface mine and rock crushing quarry where none ever existed. These ordinances pre-existed DeKalb Stone's sub-lease of the land and they do not prevent DeKalb Stone from continuing the nonconforming use which was granted, nor do they prevent DeKalb Stone from using the land as allowed under the existing zoning for the property. Thus, even when viewed under the takings clause as required by *Graham* and *Albright*, Plaintiff has still failed to state a claim.

There is yet another reason why Plaintiff has cast its claim under substantive due process rather than as a taking. That is because in doing so, Plaintiff can avoid the ripeness requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d 126 (1985) (Fifth Amendment is not violated by government taking of property, but only by such taking without compensation. Hence, a Fifth Amendment takings claim is not ripe until plaintiff has been denied compensation by state). Here, Plaintiff is attempting to pursue an unripe takings claim before it has first sought compensation through the courts of Georgia. This Court should therefore deny certiorari at this time.

C. Substantive due process Does Not Protect Property Interests Arising Under State Law.

Another such area where the Supreme Court has not extended Substantive due process protection is when the alleged substantive right arises from state law only. *See e.g., Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). In *Bishop*, a police officer claimed to have been discharged from employment based on deliberate lies of a city manager. The Court first looked at North Carolina law and found that the Police Officer had no property right protected by the Fourteenth Amendment. The Court wrote that even if this allegation (being fired based upon lies) was true, it might provide a basis for a state law tort claim, but that

> "[t]he federal court is not the proper forum in which to review the multitude of personnel decisions that are made daily by public agencies. . . . The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Id.*, at 349-350, 96 S.Ct. 2080.

Nine years later, the Supreme Court decided a similar case in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985). There, the Supreme Court found that the petitioners, unlike the policeman in Bishop, did have a property right in continued employment. Yet, even after finding a property right arising under state law, which was taken from petitioner by administrative action when he was fired, the Supreme Court found that petitioners were entitled to procedural due process protection for this right, not substantive due process. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985) (Powell J., concurring) ("[S]ubstantive due process rights are created only by the Constitution.").

The Court has also held that claims arising under state tort law are not entitled to substantive due process protection under the Fourteenth Amendment. This is because the Constitution was not intended to supplant traditional tort law. *Daniels v. Williams*, 474 U.S. 327, 332, 106 S.Ct. 662, 665,

88 L.Ed.2d 662 (1986) (Prisoner who tripped over pillow negligently left on stairs by deputy does not have a claim for Due Process deprivation of life, liberty or property). *Collins v. City of Harker Heights*, 503 U.S. at 125 (The due process clause does not transform every tort committed by a state actor into a constitutional violation).

Property rights arise under state law. *Board of Regents v. Roth*, 408 U.S. at 577. In this regard, land use rights are a species of those state created property rights. Given this fact, the Eleventh Circuit first assumed, without deciding, that Plaintiff was asserting a protected property interest. *DeKalb*, 106 F.3d at 959, n. 5. The Eleventh Circuit then determined that the state action complained of here – enforcement of existing zoning regulations which prohibit expansion of non-conforming uses – was an administrative executive action instead of a legislative action. As such, the Eleventh Circuit then framed the issue as to " . . . whether a substantive due process cause of action exists where an executive actor deprived Appellant of a state-created property right." *Id.* at 990.

The Eleventh Circuit concluded that such allegation implicated only procedural due process instead of substantive due process, relying upon *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261 (1992); *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 515, 88 L.Ed.2d 523 (1985); and, *Bishop v. Wood*, 426 U.S. 341, 349-350, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) for this conclusion. As shown above, these are all cases where a plaintiff claimed a deprivation of a state created property interest (i.e. continued employment) as a result of administrative actions (i.e. termination from employment). In each of those cases, the Supreme Court applied a procedural due process analysis instead of substantive due process[6]

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[6] Contra, *Harrah Ind. School Dist. v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (even though decision to fire petitioner was an executive action, and presumably would trigger procedural due process

because each plaintiff claimed a wrongful deprivation of a state created property interest. This result makes sense because "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). Hence, the decision in *DeKalb Stone v. County of DeKalb County* is consistent with existing precedent of this Court as this petitioner is alleging a wrongful deprivation of a state created property interest and such claim should be addressed, if at all, under procedural due process instead of substantive due process.

3. Emerging Caselaw From Other Circuits Supports Eleventh Circuit's Decision in DeKalb v. DeKalb Stone.

Although Petitioner characterizes the Eleventh Circuit as being all alone in ruling that state created property rights are not protectible under substantive due process, a review of the cases cited by Petitioner shows an emerging trend in other circuits consistent with this premise and away from expanding substantive due process rights pursuant to cautionary instruction from this Court.

First Circuit

In *Ortiz De Arroyo v. Barcelo*, 765 F.2d 275 (1st Cir. 1985) a substantive due process claim was allowed to survive a motion to dismiss because it contained an allegation that the governmental action amounted to a taking without compensation. This is not inconsistent with the Eleventh Circuit's decision because the protection against uncompensated takings is fundamental under the

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analysis, Supreme Court applied substantive due process analysis because it chose to analyze the rule itself for rational relation to state interest). In the instant case, there has been no challenge to the rule itself, only to the application of that rule by an executive actor.

Fifth Amendment and is made applicable to the states under the Fourteenth Amendment.

More recently, the First Circuit found no such substantive due process claim in a case which did not implicate the takings clause. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1990) (rejections of development permits do not ordinarily implicate substantive due process).

Second Circuit

At one point, the Second Circuit seemed willing to recognize a substantive due process claim from deprivation of a state created property interest, but has issued more recent decisions which do not recognize such a claim.

In *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988) the Second Circuit stated that denial of a certificate of occupancy might be actionable under substantive due process, especially under circumstances where the owner produced some evidence to show that the property had been zoned, and actually used, as commercial property before he acquired it. *Id.*, at 212-213. Yet, a year later, the Second Circuit rejected a developer's substantive due process claim, finding that he did not have a property interest protectible under due process to receive a building permit for the second stage of a building renovation. *See, RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918-919 (2d Cir. 1989). Most recently, the Second Circuit ruled that a landowner did not have a constitutionally protected property interest under substantive due process to compel an insulation inspection that the city inspector refused to perform. *Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1994).

Third Circuit

In 1994, the Third Circuit did recognize a substantive due process claim arising from the arbitrary or irrational denial of a request for variance. *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir.

1994). However, in doing so, the *DeBlasio* court expressed reluctance to afford substantive due process protection to state created property rights because it could find no clear precedent from the U. S. Supreme Court. *Id.*, at 598. It also noted that not all property interests protected under procedural due process are worthy of protection under substantive due process. *Id.* Finally, the Third Circuit agreed that the concept of substantive due process protects only fundamental property interests. *Id.*, at 599.

Fourth Circuit

The Fourth Circuit's decisions are consistent with the Eleventh Circuit's in the area of substantive due process. In *Gardner v. City of Baltimore*, 969 F.2d 63 (4th Cir. 1992), the Fourth Circuit determined that a disappointed developer had no property interest worthy of Fourteenth Amendment protection under substantive due process. To reach this decision, the Fourth Circuit looked to see whether the developer had a legitimate claim of entitlement to the proposed development, and rejected the claim when it determined that the decision maker had been vested with discretion to approve or reject such proposals. *Id.*, at 64. The Court went on to note that routine land use disputes are simply not the business of the federal courts (*Id.*, at 67) and that 42 U.S.C. §1983 does not constitutionalize every run of the mill dispute between a developer and a town planning agency. *Id.*, at 68.

Fifth Circuit

Earlier decisions of the Fifth Circuit would seem to recognize a substantive due process claim from deprivation of a state created property interest. *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987) (summary judgment for defendants reversed because material issues of fact existed whether professor's substantive due process rights were violated when he was fired and professor asserted claim of tenure).

However, a more recent decision casts doubt on this point. *See, Williams v. Texas Tech University Health Sciences Center*, 6 F.3d 290 (5th Cir. 1993). (Fifth Circuit affirmed finding on the merits against tenured professor's claims of substantive due process violation from a forced salary reduction). Additionally, in another decision, the Fifth Circuit analyzed a state created property claim (continued employment) under a procedural due process analysis. *Schaper v. City of Huntsville*, 813 F.2d 709, 716-717 (5th Cir. 1987) (fired police chief failed to state a claim for substantive due process violation where, inter alia, the right violated arose from city personnel policies rather than from Federal Constitution).

Sixth Circuit

In a case decided before this Court's opinions in *Graham v. Conner* and *Albright v. Oliver*, the Sixth Circuit recognized that substantive due process protects specific fundamental rights, which are those implicit in the concept of ordered liberty. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). There, a female professor claimed equal protection and substantive due process violation from alleged denial of tenure solely on the basis of gender. The case went to trial and the jury found that two defendants had violated her equal protection and substantive due process rights. Even though her equal protection claim later failed, the Sixth Circuit deemed her to have a property interest in not being terminated from a state job for a constitutionally impermissible purpose, i.e. on the basis of her gender. *Id.*, at 1329. Were this case decided today, *Graham* and *Albright* would require that the case be evaluated under Title VII instead of substantive due process, and there is no reason to think the Sixth Circuit would ignore this controlling authority.

Seventh Circuit

The Seventh Circuit has issued mixed signals on whether state created property rights are worthy of substantive due process protection. In *Clark v. County of Winnebago*, 817 F.2d 402 (7th Cir. 1987) the plaintiff lost at trial on his claim that the denial of his rezoning request violated his due process rights. The Seventh Circuit affirmed the trial Court's rulings because the County's zoning law was not so arbitrary as to violate due process and the law as applied to plaintiff did not do so either. In both instances, Plaintiff failed to overcome the presumption of validity for the ordinance itself (*Id.* at 408-409) and the presumption of validity of the specific zoning decision (*Id.* at 409). In reaching this decision, the Seventh Circuit noted that " . . . as long as there is room for disagreement, the local zoning decision must control." *Id.* at 409, citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

In contrast, in *Kauth v. Hartford Insurance Company of Illinois*, 852 F.2d 951 (7th Cir. 1988) an allegation of unreasonable deprivation of a state created property interest was deemed insufficient to state a substantive due process claim under Supreme Court precedent. In reaching this decision, the Seventh Circuit noted that most Supreme Court decisions on substantive due process involve some fundamental right that is categorized as a liberty interest. *Id.* at 956. It further noted that there is no Supreme Court precedent which holds that mere deprivation of a property interest is sufficient to state a substantive due process claim. *Id.* at 957. Because Kauth did not allege that defendants violated any substantive provision of the Constitution, he has failed to state a claim for substantive due process. *Id.* at 958.

In *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989), the Seventh Circuit found a substantive due process claim to exist where the property owner alleged that the denial of a certificate of occupancy prevented him from using his property for any purpose. *Id.*, at 557. In reaching this decision, the Court noted that in order to have a substantive due process claim based on deprivation of a state created property interest, the

claimant must also have a violation of some other substantive constitutional right or show state law remedies to be inadequate. *Id.*, at 558. However, the Seventh Circuit went on to find an exception in local land use cases, finding that such a property interest may invoke the substantive due process protection. *Id.* This last reasoning is unfortunate and unnecessary since the denial of the certificate of occupancy could easily have been analyzed as a takings claim if it prevented the owner from using his property for any purpose. *See, Agins*, 447 U.S. at 260 (taking occurs when landowner is deprived of all economic use of property).

Eighth Circuit

In the only case cited by the petitioner, the Eighth Circuit's ruling is consistent with the proposition that only fundamental rights are protected under the substantive due process clause. In *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) the Court ruled that the landowner had a viable substantive due process claim when unconstitutional conditions were placed on his request for a building permit. Specifically, the landowners claimed that the city conditioned the issuance of the permit upon a conveyance of land to private parties for a nonpublic purpose. *Id.* On these allegations, the Eighth Circuit found that the plaintiffs stated a substantive due process claim. *Id.*, at 607. Even though this decision predated *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*, its reasoning is perfectly consistent with those decisions. Those cases stand for the proposition that it is a taking of property for the government to condition the issuance of a permit upon a requirement that the applicant dedicate a portion of his property for purposes unrelated to the proposed development.[7]

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[7] However, in light of *Graham v. Connor*, the *Littlefield* decision, if rendered now, would in all likelihood be decided on the takings theory rather than under substantive due process.

Ninth Circuit

In two very recent decisions, the Ninth Circuit has made its own advances in the area of substantive due process which are consistent with this Court's precedents. In *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997) the property owners' application to subdivide land was denied and they brought claims for inverse condemnation and substantive due process. The Ninth Circuit, relying on its decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) held that plaintiffs' claim was really in the nature of a taking, and as such, could not be brought under the substantive due process clause because the Fifth Amendment provided an explicit source of constitutional protection for this claim. *Macri*, at 1499-1500. The Ninth Circuit was compelled to reach this decision by *Graham v. Connor* which provides that if there is an explicit source of constitutional protection against the challenged governmental conduct, substantive due process does not apply. *Id.*, at 1500. The Ninth Circuit also relied on *Dolan v. City of Tigard*, 512 U.S. 374, 383-385 (1994) for the premise that the Fifth amendment takings clause applied to the states through the Fourteenth Amendment, and the Ninth Circuit thereby rejected the suggestion that the case was actually grounded in substantive due process. *Macri*, at 1500.

Tenth Circuit

In the only Tenth Circuit decision cited by petitioner, the Court never reached the question of whether state created property interests are cognizable under the substantive due process clause. *Landmark Land Company of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) (Dismissal of complaint on ripeness grounds was affirmed since the developer had not shown final, definitive decision from the county on his development plan).

D.C. Circuit Court of Appeals

In *Shenk v. Zoning Commission of the District of Columbia*, 440 F.2d 295 (D.C. Cir. 1971) the Court perhaps implicitly recognized a substantive due process claim from the arbitrary denial of plaintiff's rezoning request. However, this conclusion is by no means incontestable because nowhere in the decision does the Court address the origin of the right at issue in the claim. Even if we assume that this case involved a substantive due process claim, the case is still of little precedential value since it predated several critical decisions of the Supreme Court in this area of due process such as *Board of Regents v. Roth*, *Graham v. Connor*, *Albright v. Oliver*, and *Bishop v. Wood*.

CONCLUSION

DeKalb Stone's Petition for Certiorari should be denied because further review of the denial of the preliminary injunction will result in piecemeal litigation. Certiorari should also be denied since the Eleventh Circuit's decision below is consistent with this Court's precedent because substantive due process protects only fundamental rights and there can be no claim for substantive due process when a specific constitutional provision applies. Finally, certiorari should be declined because emerging caselaw from other Circuits is consistent with this Court's precedent and the Eleventh Circuit's decision below.

Respectfully submitted,

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